Sabah Forest Industries Sdn Bhd v The Honourable Minister of Human Resources Malaysia & Anor

COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-01(IM)(NCVC)-291–08 OF 2016
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND HARMINDAR SINGH JJCA
10 NOVEMBER 2017

Labour Law — Trade union — Challenge against decision of Minister — Allegation Minister acted unreasonably — Whether decision made by Minister rational — Whether Minister failed to take into account duties and responsibilities of employees — Whether unreasonableness common ground challenge decision of administrative authority — Doctrine of estoppel per rem judicatum

The second respondent had served a fresh claim to the Director of the Sabah Branch of the Department of Industrial Relations ('DIR Sabah') for recognition to represent the appellant's ('the applicant') employees. The applicant rejected the claim and the second respondent reported the matter to the Director General for Industrial Relations ('DGIR'). The DGIR required the applicant to furnish the list of the employees' names for recognition and the applicant obligingly did so but excluded employees in the categories of supervisor, commercial, sales and marketing and administration. The applicant argued that 154 employees were not eligible for the union membership. Meanwhile, the applicant and the second respondent agreed that a sample of 15 employees from the Human Resource and Administration Department (Medical, Residence and Facilities and Administration) and 102 employees from the category of supervisors shall be interviewed by the DIR Sabah to ascertain their capacity and the result obtained from the interview would apply to determine the capacity to the rest of the 154 employees. After the investigation was completed, the DIR Sabah forwarded the investigation report to the DGIR and the DGIR informed and notified the first respondent of the same. The report was later forwarded to the Minister by the DGIR who decided that the employees in six posts were not eligible to union membership and employees in 35 posts were eligible for union membership ('the decision'). In an application at the High Court for judicial review to quash the decision, the applicant mounted a challenge against the decision on the grounds that the Minister had: (a) acted unreasonably and therefore, the decision was irrational; (b) failed to take into account the duties and responsibilities of the respective employees as described in the respective job descriptions before coming to the decision; and (c) had left indeterminate the capacities of 57 employees out of the sample of 117 employees who were interviewed by the DIR Sabah. The

High Court dismissed the application. Hence the present appeal. A

Held, dismissing appeal with costs:

(1) Since the applicant had, in the court below, abandoned the challenge on the issue that the Minister had left indeterminate the capacities of 57 employees out of the sample of 117 employees who were allegedly interviewed by the DIR Sabah, the applicant was barred from ventilating the same issue under the doctrine of *estoppel per rem judicatum* (see paras 32 & 36). B

(2) The grounds to challenge the decision of an administrative authority were based on illegality, procedural impropriety and proportionality. The challenge by the applicant was based on unreasonableness which was not the common accepted grounds to challenge the decision of an administrative authority. More so, the decision of the Minister shall be final and shall not be questioned in any court, as provided under s 9(6), should be upheld. There was no material of any impropriety or unreasonableness in the decision. The issue on unreasonableness or irrationality had been answered by the Minister in his affidavit in opposition (see paras 33–34). C D E

[Bahasa Malaysia summary

Responden kedua telah mengemukakan tuntutan baharu kepada Pengarah Jabatan Perhubungan Perusahaan Cawangan Sabah ('DIR Sabah') bagi pengiktirafan untuk mewakili pekerja-pekerja perayu ('pemohon'). Pemohon menolak tuntutan tersebut dan responden kedua melaporkan hal ini kepada Ketua Pengarah Perhubungan Perusahaan ('DGIR'). DGIR meminta pemohon mengemukakan satu senarai nama pekerja-pekerja bagi pengiktirafan dan pemohon melakukannya tetapi mengecualikan nama pekerja-pekerja di bawah kategori penyelia, komersial, jualan dan pemasaran dan pentadbiran. Pemohon menghujahkan bahawa 154 pekerja-pekerja tidak layak menjadi ahli kesatuan. Sementara itu, pemohon dan responden kedua bersetuju bahawa sampel 15 orang pekerja dari Jabatan Pentadbiran dan Sumber Manusia (Perubatan, Residen dan Fasiliti dan Pentabiran) dan 102 pekerja dari kategori penyelia akan ditemu bual oleh DIR Sabah untuk menentukan kapasiti mereka dan keputusan yang diperoleh daripada temu bual tersebut akan terpakai untuk menentukan kapasiti 154 pekerja yang lain. Selepas temu bual dijalankan, DIR Sabah mengemukakan laporan siasatan kepada DGIR dan DGIR memberitahu dan memaklumkan perkara ini kepada responden pertama. Laporan tersebut seterusnya dikemukakan kepada Menteri oleh DGIR yang memutuskan bahawa pekerja-pekerja dalam enam jawatan tidak layak menjadi ahli kesatuan dan pekerja-pekerja dalam 35 jawatan layak menjadi ahli kesatuan ('keputusan'). Dalam permohonan di Mahkamah Tinggi bagi semakan kehakiman untuk membatalkan keputusan tersebut, pemohon mencabar keputusan atas alasan Menteri: (a) bertindak F G H I

secara tidak munasabah dan dengan itu, keputusan tersebut tidak rasional; (b) gagal mengambil kira tugas dan tanggungjawab setiap pekerja seperti yang diperihalkan dalam penerangan kerja masing-masing sebelum membuat keputusan; dan (c) meninggalkan, tanpa apa-apa keputusan, kapasiti 57 pekerja daripada sampel 117 pekerja yang ditemu bual oleh DIR Sabah. Mahkamah Tinggi menolak permohonan tersebut. Oleh itu rayuan ini difailkan.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan pemohon telah, dalam mahkamah bawahan, mengabaikan cabaran tentang isu Menteri meninggalkan, tanpa apa-apa keputusan, kapasiti 57 pekerja daripada sampel 117 pekerja yang dikatakan ditemu bual oleh DIR Sabah, pemohon terhalang daripada menyelesaikan isu yang sama di bawah doktrin *estoppel per rem judicatum* (lihat perenggan 32 & 36).

(2) Alasan-alasan untuk mencabar keputusan kuasa pentadbiran adalah berasaskan ketaksahan dan kesalahan dan perkadaran prosedur. Cabaran oleh pemohon adalah berasaskan ketidakmunasabahan, sesuatu yang bukan lazimnya diterima sebagai alasan untuk mencabar keputusan pihak berkuasa pentadbiran. Tambahan lagi, keputusan Menteri muktamad dan tidak akan dipersoal dalam mana-mana mahkamah, seperti yang diperuntukkan di bawah s 9(6), harus disokong. Tiada apa-apa material kesalahan atau tidak munasabah. Isu tidak munasabah atau tidak rasional dijawab oleh Menteri dalam afidavit bantahan beliau (lihat perenggan 33–34).]

Notes

For cases on trade union in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2078–2160.

Cases referred to

Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377; [2014] 1 LNS 686, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, FC (folld)

Council of Civil Service Unions and other appellants v Minister for the Civil Service respondent [1985] AC 374, HL (refd)

Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal [2016] 4 MLJ 621; [2016] 6 CLJ 215, CA (refd)

Minister of Human Resources, Malaysia v Diamet Klang (M) Sdn Bhd and another appeal [2013] MLJU 1617; [2015] 6 CLJ 181, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

RHB Bank Bhd v YB Menteri Sumber Manusia Malaysia & Anor [2017] 6 MLJ

239; [2017] 1 LNS 975, CA (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 9, 9(1A), (1B), (1C), (1D), (2), (4), (4)(a), (4)(b), (6)
Trade Unions Act 1959

Appeal from: Application For Judicial Review No BKI-13-NCvC-17/5 of 2015 (High Court, Kota Kinabalu)

S Vanugopal (S Vanugopal & Partners) for the appellant.
Andi Razalijaya (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
George Aludah (Aludah & Co) for the second respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/applicant against the decision of the High Court, Kota Kinabalu, dismissing the appellant's judicial review application for an order of certiorari to be issued to quash the decision of the Minister of Human Resources ('the first respondent'). The decision of the first respondent was made under s 9(1C) of the Industrial Relations Act 1967 ('the Act'). The decision pertains to the categorisation of workers for the purpose of eligibility to become union members ('the impugned decision').

[2] We heard the appellant's appeal on the 19 May 2017. After considering the written submissions and the oral arguments from all parties on the issues raised, we dismissed the appeal. We now give our reasons for doing so.

[3] For ease of reference the parties will be referred to as they were described in the court below.

BRIEF BACKGROUND FACTS

[4] The applicant sought the following relief as set out in their application for judicial review:

(a) that leave granted to Sabah Forest Industries Sdn Bhd, the applicant herein, to apply for an order of certiorari to remove into this honourable court for the purpose of quashing in totality the decision dated 26 March 2015 under s 9(1C) of the Industrial Relations Act 1967 of the

Honourable Minister of Human Resources, the first respondent herein, on the capacity of the several workmen who are employees of the applicant as stated in para (ii) thereto ('the impugned decision');

(b) that pending the dispos al of this application all actions and proceedings there under which may be or have been taken in pursuance of the said decision be stayed;

(c) that all necessary and consequential directions and/or other orders be given; and

(d) that the costs occasioned by this application be taxed.

[5] Briefly the salient and undisputed facts of the case are as follows. The second respondent had for a long time attempted to represent the workers of the applicant. By letter dated 10 March 2014, the Director of the Sabah Branch of the Department of Industrial Relations ('DIR Sabah') allowed the second respondent to serve a fresh claim for recognition to represent the eligible employees of the applicant. Form A dated 17 March 2014 under s 9(2) of the Act was served on the applicant. The applicant rejected the claim for recognition vide letter dated 2 April 2014. The second respondent reported the matter under s 9(4) of the Act to the Director General for Industrial Relations ('the DGIR') by letter dated 4 April 2014.

[6] The DGIR then proceeded to act under s 9(4)(a) and (b) of the Act requiring the applicant to furnish the list of the employees' names in Form B as at the date of the second respondent's claim, for recognition. The appellant furnished Form B vide latter dated 22 August 2014. The DGIR then directed the DIR Sabah to conduct the secret ballot process. Meetings on the secret ballot were duly held on 22 September 2014 and 26 September 2014 but a dispute arose as to the scope of the second respondents' membership. The applicant allegedly sought to exclude employees in the categories of supervisor, commercial, sales and marketing and administration divisions.

[7] Subsequent to that, vide a letter dated 29 September 2014, the second respondent referred the matter to the DGIR pursuant to s 9(1A) of the Act to determine whether the applicant's employees were employed in a managerial, executive, confidential or security capacity or otherwise.

[8] Upon direction by DGIR vide letter dated 17 October 2014, DIR Sabah held several meetings pursuant to s 9(1B) of the Act to discuss the list of the employees' names in the disputed post and those who were eligible for the secret ballot. The parties could not agree on the eligibility of 154 employees but they agreed that the Department of Industrial Relations should conduct investigations to determine whether the said employees were employed in the managerial, executive, confidential or security capacity or otherwise. The

applicant contended that 139 of the 154 employees were in the supervisory category and the balance of 15 employees were from the human resource division holding the posts of paramedic, assistant nurse, clerk, medical assistance, housekeeper/clinic attendant, trained assistant nurse, assistant system administrator, administrative assistant, CCTV operator and senior clerk from medical, residence and facilities and administration departments. Therefore, the applicant argued that all of the 154 employees were not eligible for the union membership.

[9] Meanwhile, the applicant and the second respondent agreed that a sample of 15 employees from the Human Resource & Administration Department (medical, residence and facilities and administration) and 102 employees from the category of supervisors shall be interviewed by the DIR Sabah to ascertain their capacity and thereupon apply the result obtained from the interview to determine the capacity to the rest of the 154 employees. For the purpose of investigation, the applicant forwarded information regarding the job descriptions carried out by those relevant employees to the DIR Sabah for the DIR Sabah to conduct random interviews and/or enquiries on the employees in each post which was disputed. The interview and enquiries were done on numerous dates to identify the job scope, role, responsibility and other information in relation to the job of the employees involved.

[10] After the investigation was completed, the DIR Sabah forwarded the investigation report to the DGIR and received on 14 January 2015. The DGIR informed and notified the first respondent of the same pursuant to s 9(1C) of the Act. The report was later forwarded to the Minister by the DGIR under the same sub-section. In exercise of his powers under s 9(1D) of the Act, the Minister made a decision in respect of the dispute in Form E on 26 March 2015.

[11] The Minister's decision was in two parts, ie in part (i) he decided that the employees in six posts are not eligible to union membership and in part (ii) he decided that employees in 35 posts are eligible for union membership ('the impugned decision'). The relevant part of the Minister's decision are reproduced below:

(a) the positions of senior supervisor, supervisor (electrical), supervisor (logging), supervisor (boiler operator), assistant supervisor (ITC ply mill), assistance supervisor (QC) are paid employees under the managerial , executive, confidential or security capacity; and

(b) the positions of senior supervisor (sales), supervisor, supervisor (predictive maintenance), supervisor (document control), supervisor (sales), supervisor (operation), supervisor (mechanical), supervisor (mechanical fitter), supervisor (ply mill product admin), supervisor

(logyard), supervisor (saw mill), supervisor (warehouse), supervisor (nursery), supervisor (ril), supervisor (technical services), supervisor (admin and account), administrative supervisor (nursery), community liaison supervisor, supervisor (field), supervisor (shipping and logistic), supervisor camp/nursery, supervisor (QC), assistance supervisor (logyard), assistance supervisor (central material store), paramedic, assistance nurse, clerk, medical assistance, housekeeper/clinic attendance, trained assistance nurse, administrative assistance (residence), administrative assistance, CCTV operator, senior clerk, assistant system administrator are not paid employees under the managerial, executive, confidential or security capacity.

[12] The DGIR vide letter dated 2 April 2015 conveyed the Minister's decision to the applicant as well as to the second respondent.

AT THE HIGH COURT

[13] At the High Court, the applicant mounted a challenge against the Minister's decision on three broad grounds as follows:

(a) the Minister had acted unreasonably and therefore the impugned decision was irrational;

(b) the Minister had failed to take into account the duties and responsibilities of the respective employees as described in their respective job descriptions before coming to the impugned decision; and

(c) the Minister had left indeterminate the capacities of 57 employees out of the sample of 117 employees who were allegedly interviewed by the DIR Sabah.

[14] The findings of the High Court were as follows:

(a) there was no merit in the ground of challenge that the Minister had left indeterminate the capacity of 57 employees. The challenge by the applicant is only on unreasonableness or irrationality as envisaged under para 25 of the affidavit in support affirmed by Susiman a/l Theyan @ Many on behalf of the applicant. This outside the common accepted grounds to challenge the decision of an administrative authority which are illegality, procedural impropriety and proportionality (see *Council of Civil Service Unions and other appellants v Minister for the Civil Service respondent* [1985] AC 374 and *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686);

(b) based on agreement between the applicant and the second respondent, a sample of 15 employees from Human Resource and Administration and

102 employees from the categories of supervisors was interviewed by the DIR Sabah to ascertain their eligibility to became union members and the result applied to the balance of the 154 employees. In the premises, the Minister had decided on all the eligibility of all the said employees whose status was disputed;

(c) on the argument that the decision of the Minister was irrational, the learned High Court judge had considered the employees job description and their confidential capacity before deciding that he see no reason to criticise the decision of the Minister on grounds of unreasonableness or irrationality; and

(d) there is no impropriety or unreasonableness in the impugned decision and the court should give effect to s 9(6) of the Act in that the decision of the Minister shall be final and shall not be questioned in any court (see *Minister of Human Resources, Malaysia v Diamet Klang (M) Sdn Bhd and another appeal* [2013] MLJU 1617; [2015] 6 CLJ 181).

[15] Based on the above findings, the learned High Court judge dismissed the application with costs. Thus the appeal before us.

THE APPEAL

[16] In its memorandum of appeal, the applicant forwarded six grounds of appeal as follows:

(a) the first respondent had failed to take into account the detailed job descriptions of each employees in the list provided before deciding that the employees in para (ii) of the impugned decision are in the managerial, executive, confidential or security capacities;

(b) the first respondent had acted irrationally when he included in para (ii) of the impugned decision those employees who are eligible for union membership but excluded employees with similar jobs descriptions for union membership in para (i) of the said impugned decision;

(c) the first respondent had acted irrationally when he excluded an assistant supervisor as eligible for union membership and placed him in para (i) of the said impugned decision but included a supervisor with similar or higher responsibilities as eligible for union membership and placed him in para (ii) of the said impugned decision;

(d) the first respondent had acted irrationally when he included the CCTV operator, whose scope of work is strictly security in nature, as eligible for union membership and placed him in para (ii) of the said impugned decision;

(e) the first respondent had acted irrationally when he included the administration and accounts supervisor in the plantation division as eligible for union membership and placed her in para (ii) of the said impugned decision whereas all employees in the finance department were agreed between the parties to be excluded from union membership; and

(f) the first respondent had failed to decide on the capacity of 57 employees thereby leaving their capacities for union membership indeterminate.

[17] Before us, learned counsel for the applicant canvassed only one issue, ie that that learned High Court judge had erred in law and in fact when His Lordship dismissed the applicant's judicial review application on the ground that the Minister did not err in fact and law and thereby did not act irrationally as the Minister did not leave the capacity of any employees indeterminate. Learned counsel submitted that even though 117 employees had been interviewed, nevertheless, the Minister had left the capacities of 57 employees undetermined for eligibility for union membership.

[18] Learned counsel argued that the Minister had failed to decide on the eligibility for union membership of the following posts:

(a) boiler supervisor (ITC);

(b) supervisor (timber production — raw material);

(c) supervisor (ITC sawmill);

(d) supervisor (clonal multiplication);

(e) supervisor (pulp and paper);

(f) senior supervisor (pulp and paper);

(g) supervisor (plantation);

(h) supervisor (plumbing);

(i) supervisor (commercial procurement);

(j) supervisor (integrated timber complex); and

(k) 47 employees in the supervisory category.

[19] Learned counsel further argued that the Minister had left out about 49% of the sample of 117 employees agreed between the applicant and the second respondent. Hence, learned counsel urged this court to allow the appeal to quash the decision of the Minister on the ground that the results obtained from the impugned decision were incomplete and as such cannot be applied to the remaining employees in the list to determine their eligibility for union membership.

[20] Finally, learned counsel argued that the decision of the learned High Court judge was plainly wrong when His Lordship held that:

> Thus the employees only need to refer to the posts referred to on the decision of the Minister to find out their eligibility.

[21] Learned senior federal counsel for the first respondent ('learned SFC') submitted that the argument put forth by the learned counsel for the applicant was an afterthought simply on the ground that the applicant had abandoned the same argument in the court below. Learned SFC submitted that the applicant cannot raised the same issue now before this court. They are estopped from raising the same argument. Learned SFC relied on the Federal Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783.

OUR DECISION

[22] The matter before us concerned with an issue on the eligibility of employees of the applicant to be members of a union, Kesatuan Pekerja-Pekerja Industri Perkayuan Sabah, the second respondent herein. The applicant contended that 139 employees out of 154 employees were in the Supervisory Category and that 15 employees are from the Human Resource Division and therefore not eligible for union membership. It is not disputed that the second respondent had been registered as a trade union pursuant to the Trade Unions Act 1959 and had been recognised under s 9 of the Act.

[23] Section 9 of the Act sets out the statutory procedure before an employee can become eligible or recognised as a member of a trade union. It is pertinent that the views of the employer, in this case, the applicant, must be obtained and taken into account. Section 9 states:

> 9 Claim for recognition
>
> (1) No trade union workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —
>
> (a) managerial capacity;
>
> (b) executive capacity;
>
> (c) confidential capacity; or
>
> (d) security capacity,
>
> may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above-mentioned capacities.
>
> (1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General

by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential of security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim —

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition.

(c) *(Deleted by Act A1322)*.

(3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days —

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn.

(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquires to ascertain —

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.

(4B) For the purpose of carrying out his functions under subsection (1B) or (4A) the Director General — A

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement; B

(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and C

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot. D

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4A) the Minister shall give his decision; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify. E

(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court. F

[24] The law on judicial review application had been ventilated in a plethora of cases which ruled that judicial review is not an appeal from the decision but a review of the manner in which the decision, in our case the impugned decision by the Minister was made. The High Court judge in hearing the judicial review application is not concerned whether the impugned decision itself was reasonable or fair based on the merits of the facts before him. G

[25] The approach of this court had been explained at length by Hamid Sultan Abu Backer JCA in the most recent case of *RHB Bank Bhd v YB Menteri Sumber Manusia Malaysia & Anor* [2017] 6 MLJ 239; [2017] 1 LNS 975 as follows: H

(a) the traditional view in respect of judicial review, in respect of executive decision which is still good law in the Malaysian context was expounded in the case of *Council of Civil Service Unions and other appellants v Minister for the Civil Service respondent* [1985] AC 374. That case anchors the point to say judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. In doing so, I

the court are obliged to consider the jurisprudence related to illegality, irrationality and procedural impropriety and when it relates to sentence or deprivation thereof of the subject then the proportionality principle need to be taken into consideration (see *Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal* [2016] 4 MLJ 621; [2016] 6 CLJ 215). However, when judicial review is related to a tribunal decision, Malaysian courts have expanded the scope to say that the courts are permitted to scrutinise the decision not only for the process but also for substance (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629); and

(b) when it related to recognition under s 9 of the IRA, the court has been firm to adhere to the strict jurisprudence advocated in the *Civil Service Union*'s case. The is to say, for the purpose of the instant case, whatever information needed to be furnish, it ought to have been furnished by the relevant parties when the opportunity was given so and very importantly in the instant case by the appellant. Subsequent complaint to the court to accuse the DGIR or the Minister for not taking into consideration the relevant facts according to law will not be entertained. On somewhat similar facts, the Court of Appeal in the case of *Minister of Human Resources, Malaysia v Diamet Klang (M) Sdn Bhd and another appeal* [2013] MLJU 1617; [2015] 6 CLJ 181, in dealing with s 9 of the IRA had this to say:

> From our reading of s 9 of the Industrial Relations Act 1967, we are of the view that the scheme of things under the said section is that if an employer is served with a notice of recognition and the employer notifies the Union that it refuses recognition, the Union may report the matter in writing to the DGIR (ss 9(3) and 9(4) of the Act). Upon receiving the report, the DGIR may carry out enquiries to ascertain the competency of the Union to represent the employees and the percentage of employees who want to be represented. The DGIR may resort to secret ballot in order to ascertain this fact. The DGIR may conduct the enquiries himself or he may refer it to the Director General of Trade Union (DGTU) to do it — (s 9(4A) and 9(4B) of the Act). Upon completion of the enquiries and if the matter cannot be resolved by the DGIR/ DGTU, the latter shall notify the Minister and upon receipt of such notification the Minister shall give his decision thereon (s 9(4C) and 9(5) of the Act). Under the scheme of things therefore the Minister may rely on the report by the DGTU/DGIR as to the competency issue and made his decision thereon. We think there is nothing fanciful or unreasonable for the Minister to do so. In fact we do not think the Act envisages that the Minister himself goes to the ground to conduct the enquiries in order to ascertain the truth of the facts contained in the report that was notified to him by the DGTU/DGIR ... In our view the learned High Court judge should, in the circumstances and facts of the case give

effect to s 9(6) of the Act as to the conclusiveness and finality of the Ministerial decision on competency. The provision was inserted so as to provide some stability in the labour management and organization in this country. Therefore the courts should be slow to find fault with the Minister's decision in exercising his discretion to accord recognition to a Union of workers.

[26] The learned SFC raised the issue of estoppel which we were in agreement with. The facts giving rise to the issue of estoppel had been established before us. We had the opportunity to peruse the appeal record and the facts disclosed that in the beginning, the applicant had disputed the case of 199 employees who according to the applicant should be excluded from the scope of the second respondent's membership. However, through 'Mesyuarat Rundingan Damai' conducted on 20 and 31 October 2014, both the applicant and the second respondent agreed that 45 employees were to be included in the scope of the second respondent's representations while the rest of the 154 employees were still disputed by both the applicant and the second respondent.

[27] Later, both the applicant and the second respondent agreed that a sample of 15 employees from the human resource and administration department (medical, residence and facilities and administration) and 102 employees from the category of supervisors shall be interviewed by the DIR Sabah to ascertain their capacity and thereupon apply the result obtained from the interview to determine the capacity of the rest of the 154 employees.

[28] As a result of the above understanding, learned counsel for the applicant in the court below had, on 27 June 2016, conceded that the capacity of the 154 employees had been decided and dropped the argument on the issue. We reproduce below the relevant notes of proceedings (pp 70–71 of the appeal record Vol 2 Parts B and C):

Monday Jun 27, 2016 at 9:13 am	
Hearing of enclosure (1).	
For the applicant	S. Vanugopal of S. Vanugopal & Partners
For the 1st Respondent	Rahazlan Affandi of Jabatan Peguam Negara, Malaysia, Sabah (Bahagian Civil)
For the 2nd Respondent	George Aludah of Aludah & Co
	Court resumes at 9.25 am
	Parties as before.
Court	154 disputes, 15 from HR, 139 from supervisor.

Vanugopal	Only 41 were determine. Still a large number left undetermined. Refer to the submission at para 6.10. Refer exhibit SM12 at 2nd page.
FC	Our position all 154 were determine. The breakdown of 154 has been covered by the Minister. My learned friend only accounted for the senior supervisor – the affidavit of opposition of the 1st Respondent para 14.2
Court	Stand down – 9.37 am. Court resumes at 10.25 am. Parties as before.
Sukumaran	I concede that the capacity of 154 decided. Drop argument in Encl 32.
Court	Judicial Review application dismissed with no order as to costs.
10.25 AM – 27 June 2016	RAVINTHRAN PARAMAGURU Judge

[29] The applicant in their affidavit in reply affirmed by Susiman a/l Theyan @ Many dated 12 January 2016 (pp 89–92 of the appeal record Vol 2 Parts B and C) had not disputed the averment at para 32 of the first respondents's affidavit in opposition. Paragraph 13 of the applicant's affidavit in reply thus stated:

> 13. Paragraph 32 of the 1st Respondent Affidavit In Opposition is not disputed.

[30] Paragraph 32 of the first respondent's affidavit in opposition averred to the issue of understanding and the agreement between the applicant and the second respondent to ascertain the capacity of the rest of the 154 employees to be determined by way of an interview. Paragraph 32 of the said affidavit in opposition averred that:

> 32. In response to paragraph 17 of the applicant's Affidavit, I shall aver that both the applicant and 2nd Respondent agreed that a sample of 15 employees from the Human Resource & Administration Department (Medical, Residence & Facilities and Administration) and 102 employees from the category of supervisors shall be interviewed by the Department of Industrial Relation, Sabah to ascertain their capacity and thereupon apply the result obtained from the interview to determine the capacity to the rest of the 154 employees.

[31] The learned trial judge tackled the same issue in this manner at pp 36–37 of the appeal record Vol 1 Part A as follows:

> I shall first consider the second ground of challenge. Counsel for the applicant argued that the Minister left indeterminate the capacity of 57 employees. I find no merit in this ground for the following reason. The total number of the employees that the parties could not agree in respect of their eligibility to become union members was 154. It is not disputed that the applicant and the second respondent agreed that a 'sample' of 15 employees from the Human Resource and Administration Department (Medical, Residence & Facilities and Administration) and 102 employees from the category of supervisors shall be interviewed by the Department of Industrial Relation, Sabah to ascertain their eligibility to become union members and that the result be applied to the balance of the 154 employees. The decision of the Minister which was reproduced earlier is in two parts: the first part refers to employees in six different posts that are not eligible for membership and the second part refers to employees in 35 posts who would be eligible for membership. Thus the employees only need to refer the posts referred to in the decision of the Minister to find out their eligibility. In the premises, the Minister had decided on all eligibility of all the said employees whose status was disputed. For sake of completeness, I must mention that in the final oral arguments, this issue was not pursued by counsel for applicant.

[32] It is our judgment that since the applicant had in the court below abandoned the challenge on the issue as alleged by the applicant that the Minister had left indeterminate the capacities of 57 employees out of the sample of 117 employees who were allegedly interviewed by the DIR Sabah, the learned counsel for the applicant is barred from ventilating the same issue before us under the doctrine of *estoppel per rem judicatum*. We found support from the decision of Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, where His Lordship stated:

> Thus, in *SCF Finance Co Ltd v Masri and another (No 3)* [1987] QB 1028 the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on the issue in the previous proceeding. It was held she was not entitled to assert that issue afresh in subsequent proceedings, even if that issue was not heard and determined and it was even 'reserved'. ...
>
> Another source of small confusion is the rule that generally an estoppel, of which an *estoppel per rem judicatum* is a kind, as the name implies, has to be pleaded. But in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ, applying the doctrine of res judicata against a party even if it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence is based on a question of public policy ie in this case, the question of public policy that there should be finality in litigation ...

[33] It is trite that the grounds to challenge the decision of an administrative authority are based on illegality, procedural impropriety and proportionality. The challenge by the applicant in this case before us are based on

unreasonableness which is not the common accepted grounds to challenge the decision of an administrative authority. More so, the decision of the Minister shall be final and shall not be questioned in any court as envisaged by s 9(6) should be upheld. We find no material before us and before the court below of any impropriety or unreasonableness in the decision of the Minister. The issue on unreasonableness or irrationality had been answered by the Minister in his affidavit in opposition.

[34] Learned Counsel for the applicant argued that the Minister had failed to take into consideration the detailed job description of each of the employees that were deemed eligible for union membership in the part (ii) of the impugned decision. Learned counsel for the applicant also complained that the employees in the medical services branch such as nurses, medical assistants and medical clerks were included in part (ii) of the Minister's decision. The two issues raised had been succinctly answered by the Minister in his affidavit in opposition in paras 37.4 and 37.7 which we reproduce below:

> 37.4 Though the organization chart supplied by the applicant showed that the Supervisor and Assistant Supervisor were placed in the same Division (Plywood Mill Production) but both posts were in separate units namely the Assistant Supervisor was in Quality Control Unit, whereas Supervisor was in Ply Mill Prod Unit. Besides that, investigation found that:
>
> 37.4.1 The Assistant Supervisor did not report to the Supervisor, but both posts directly reported to the Superintendent;
>
> 37.4.2 The functions, scopes of duty and responsibilities of the Assistant Supervisor and Supervisor were different according to the division or unit to which they were placed;
>
> ...
>
> 37.7 The main duty of the employees holding the posts was to only process and monitor the movement of the invoices for the purpose of payment, to manage the petty cash, lorry and machine rentals, to prepare monthly and weekly reports (salvage) and to prepare documents in relation to the plantation to the auditor;

[35] In *Minister of Human Resources, Malaysia v Diamet Klang (M) Sdn Bhd and another appeal* [2013] MLJU 1617; [2015] 6 CLJ 181, this court had decided that:

> The learned judge should have found that there was no impropriety or unreasonableness in the decision by the Minister to accord recognition to the Union (or the competency of the Union) to represent the company's employees. In our view the learned High Court judge should, in the circumstances and facts of the case give effect to s 9(6) of the Act as to the conclusiveness and finality of the Ministerial decision on competency. The provision was inserted so as to provide some stability in the labour management and organization in this country. Therefore the courts should be slow to find fault with the Minister's decision in exercising his discretion

to accord recognition to a Union of workers.

[36] Whatever it is, as we alluded to earlier in this judgment, the only issue raised by learned counsel for the applicant had been abandoned during the proceeding in the court below. Therefore, the learned counsel for the applicant was estopped from ventilating the same issue before us under the doctrine of *estoppel per rem judicatum*.

CONCLUSION

[37] Having heard the submissions and having examined the appeal records and perused the written submissions, we held the view that the learned High Court judge had rightly dismissed the applicant's application. There was no error committed by the learned High Court judge to warrant an appellate intervention.

[38] For reasons stated above, we were of the view that there was no merit in the appeal. Therefore, the appeal was dismissed with cost of RM15,000 to be paid by the applicant/appellant to the first respondent and costs of RM5,000 to be paid by the applicant/appellant to the second respondent, both costs subject to the payment of allocator. Deposit was to be refunded.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor